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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DEL KIDD AND JUDY KIDD, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress passed the Civil Service Reform Act of 1978 (CSRA) "to provide the people of the United States with a competent, honest, and productive Federal work force ..."[1] In part, the Act prescribes a remedial system to adjudicate the grievances and appeals of federal employees.

This case presents two questions:

(I) Is the United States liable for damages under the Federal Tort Claims Act (FTCA) for the actions of federal officials who, in the course of administering the grievance process, willfully conspire to violate the CSRA's regulations and effectively deprive a federal employee of the remedy due him under those regulations, when the official wrongdoing was not redressed under the remedial scheme established by Congress? Or does the CSRA preempt the FTCA, thereby barring the federal court's jurisdiction?

(II) Are federal officials liable as individuals under a *Bivens* tort claim[2] for their actions in violation of the CSRA's regulations, when those actions deprived another federal employee of the process due him under law?

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[1] Public Law 95-454, 95th Congress, 92 Stat. 1111. October 13, 1978, Section 3.

[2] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens* the United States Supreme Court created a damages remedy in which individuals could, under limited circumstances, sue federal officers for a violation of constitutional rights.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEL KIDD AND JUDY KIDD, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners Del and Judy Kidd respectfully request that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on October 7, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix hereto, pp. A-1 through A-5, infra. The opinion of the district court is also reprinted in the appendix hereto, pp. A-6 through A-8, infra.

JURISDICTION

This action was filed in federal district court for the District of Nevada under the federal question statute, 28 U.S.C. § 1331, claiming relief under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80, and directly under the due process clause of the Constitution. A subsequent amended complaint was filed, identical in nature, but naming seventeen federal officials as individual defendants. In an order prepared by

the Assistant U.S. Attorney for the District of Nevada and dated February 15, 1992, the district court dismissed the original complaint for lack of subject-matter jurisdiction and the amended complaint for failure to state a claim. The case was timely appealed to the Ninth Circuit Court of Appeals. By Memorandum filed October 7, 1993, the Ninth Circuit affirmed.

The jurisdiction of this Court to review the judgement of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

I. 28 § 1346. United States as defendant.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

II. The Federal Tort Claims Act, specifically:

28 § 2674. Liability of the United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages.

28 § 2679. Exclusiveness of remedy.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government -

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of statute of the United States under which such action against an individual is otherwise authorized.

III. The Civil Service Reform Act of 1978

Public Law No. 95-454, 92 Stat 1111, 95th Congress - October 13, 1978 - codified as it amended 5 U.S.C, and as it has since been amended by the Whistleblower Protection Act of 1989, Public Law No. 101-12, 103 Stat 16.

IV. Applicable due process clause(s) of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner, Del Kidd, is an employee of the federal Bureau of Reclamation, an agency of United States Department of Interior, and has been a federal employee since 1970. On July 12, 1991, Del and his wife Judy filed a complaint in the federal district for the District of Nevada, naming the Bureau, the Department, and unnamed employees of those agencies as defendants. The Kidds alleged subject-matter jurisdiction under the federal question statute, 28 § 1331, and 28 U.S.C. § 1346(b), the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, and the U.S. Constitution. They alleged constitutional and common-law tort claims for (1) defamation, (2) negligence, (3) deprivation of due process, (4) intentional infliction of emotional distress, (5) abuse of authority, and (6) civil conspiracy.

The Kidds alleged numerous wrongful actions taken by various employees of the Bureau and Department during the agency's handling of Del Kidd's three grievances.[3] Specifically, the complaint alleged that, counter to established regulations, federal officials involved in the administrative processing of Kidd's grievances and appeals, knowingly did the following:

- failed to advise Kidd of his option to file a grievance and

[3] Kidd's three grievances involved the following: On April 10, 1989, Kidd filed a grievance against a division chief at the Yuma Projects Office (YPO) for continued harassment and against the Project Manager at the YPO for failing to address the harassment when he was made aware of it. Fifteen days after Kidd's grievance was received, the Project Manager summarily placed Kidd on administrative leave and gave him four days to decide between taking early retirement or a permanent transfer to the Regional Office in Boulder City, Nevada. Kidd accepted the transfer under duress. But because he chose not to retire, Kidd was detailed out of YPO to the Bureau's Phoenix, Arizona, office for two months until the effective date of his transfer in July. When Kidd was detailed out of YPO, he appointed his wife as his representative in his grievances and appeals.

Kidd attempted to amend his first grievance citing, the transfer as further harassment. However, the Bureau refused and, instead, created a second grievance concerning the administrative leave, detail and transfer. Then, in July 1990, the Bureau ordered a 14-day suspension against Kidd and he filed yet a third grievance.

pursue appeals. (CR1 p. 7.)[4]

- improperly treated Kidd's letter requesting an extension of time during which to file a grievance as a formal grievance itself, (CR1, p. 5.) and then ignored Kidd's informal grievance when officially filed. (CR1, p. 5.)
- improperly placed Kidd on administrative leave. (CR1, p. 6.)
- improperly gave Kidd just four days to decide between taking retirement or accepting a transfer. (CR1, p. 6.)
- forced Kidd to present his grievance against his supervisor to that same supervisor for resolution. (CR 1, pp. 5 & 8.)
- narrowed the issues presented in Kidd's grievance from his claims of continued harassment and failure to address the harassment to just Kidd's Letter of Warning. (CR1, p. 5.)
- failed to allow Kidd to amend his first grievance and improperly created Kidd's second grievance with no input from him. (CR1, p. 8.)
- improperly designated individuals known to have been involved in ordering Kidd's transfer to review and decide his grievance concerning the transfer. (CR1 p. 8.)
- failed to disqualify themselves from reviewing and deciding Kidd's grievances. (CR1 p. 8.)
- failed to allow Kidd's grievance to be elevated to the Commissioner and Secretary of the Interior. (CR1 p.7.)
- ignored Kidd's claims against one supervisor. (CR1 pp. 5 & 8.)
- failed to comply with specific deadlines and deliberately delayed the process.[5] (CR1, pp. 5 & 17.)
- altered Kidd's grievance file as it was presented to the

[4] The appeals court record is cited in this petition as CR followed by the docket number of the appropriate document and the page of that document. The record is referenced for the convenience of opposing counsel.

[5] Kidd's first grievance filed on April 10, 1989, was not finally decided by the Bureau until May 12, 1992. In Kidd's case, a process that, by regulation, should have taken no more than 3 to 4 months took three years to complete.

Office of Hearings and Appeals examiner and prejudiced the case against Kidd. (CR1, p. 19.)

- deliberately delayed for six months the scheduling of Kidd's hearing before the Department's Office of Hearings and Appeals. (CR1, p. 14.)
- repeatedly made unsubstantiated claims of Kidd's poor conduct and performance in order to justify the ordering of Kidd's transfer. (CR1, pp. 7 & 13.)
- changed the charges against Kidd midway through the grievance process from those of poor performance to those of poor conduct. (CR1, p. 13.)
- claimed at one time that Kidd's transfer was not a disciplinary action and then reversed that position in order to justify Kidd's 14-day suspension. (CR1, p. 17.)
- conducted an unfair, biased, hearing before the Office of Hearings and Appeals. (CR1, p. 14.)
- failed to designate deciding officials at the proper level of management. (CR1 p. 17.)

The complaint further alleges that when the Kidds reported this wrongdoing to the Office of Special Counsel (OSC), it:

- failed to investigate Kidd's claims of prohibited personnel practices and ignored some of Kidd's claims. (CR1, p. 19.)
- failed to conduct adequate investigations to determine the validity of Kidd's complaints. (CR1, p. 19.)

For purposes of establishing jurisdiction, these allegations are taken as true.[6]

The district court dismissed the original complaint for lack of subject-matter jurisdiction. Citing *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991), and *Rivera v. United States*, 924 F.2d 948 (9th Cir. 1991) as controlling, the Order states that a federal employees' employment-related common law tort claims are precluded by the CSRA of 1978 and that the United States has not waived its sovereign immunity for constitutional tort claims and district courts have no subject-matter jurisdiction to hear such

[6] See: *Scheiver v. Rhodes*, 416 U.S. 232 (1974) (The pleading is read as a whole, and with all uncontroverted factual allegations being accepted as true, for the purposes of the motion only.)

claims. See: p. A-6 infra.

The Kidd's amended complaint, filed to name seventeen federal officials[7] as individual defendants in a *Bivens* action for the constitutional tort claims of the case, was also dismissed for failure to state a cause of action. See: p. A-7, infra. Again citing *Saul*, the district court held that the CSRA precludes *Bivens* claims against federal employees.

Upon appeal, the Ninth Circuit affirmed citing that, in *Rivera*, it held that the CSRA provides the exclusive remedy for federal civil service employees who allege claims arising out of their employment. And citing *Saul*, the court affirmed that the CSRA precludes constitutional tort claims against individual defendants brought under *Bivens*. See pp. A-1 to A-5, infra.

[7] In addition to Kidd's immediate supervisors, the amended complaint named all officials known to have taken part in the processing of Del's grievances. The list includes: the Regional Director and Assistant Regional Director and two regional personnel officers; two Bureau of Reclamation Commissioners, an Assistant Commissioner, and the Bureau's Chief of Personnel; The Secretary of the Interior and Interior's Chief of Personnel; and the Office of Hearings and Appeals examiner.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The CSRA should not preempt the FTCA for the common law tort claims presented in this case without the Supreme Court first determining that such peremption was the clear intent of congress.

This case alleges that in the course of processing a federal employee's grievances, federal officials willfully conspired to violate the procedures established under the CSRA's regulations, and by so doing, deprived the employee, Del Kidd, of the remedy due him under the law and deprived him of the Constitutional and other rights those regulations were written specifically to protect. Furthermore, as the Kidds sought redress under the CSRA scheme of appeals, these wrongs were not vindicated. The complaint alleges common-law tort claims against the United States for the actions of these officials, claiming defamation, negligence, intentional infliction of emotional distress, abuse of authority, and civil conspiracy.

The district court dismissed this case for lack of subject-matter jurisdiction. See p. A-6 , infra. But the Ninth Circuit's position is not based on controlling precedent or a clear mandate from Congress. Rather, it is inferred from other Supreme Court rulings involving the CSRA.[8] As the district court noted in *Rivera*, the Supreme Court has not directly considered the relationship of the CSRA and the FTCA. 924 F.2d at 951.

The common law tort claims presented by this case should not be dismissed before the Supreme Court determines whether Congress clearly intended the CSRA to preempt the FTCA in this instance. To make this determination, the Court should employ

[8] The Ninth Circuit cited *Rivera v. United States*, 924 F.2d 948, which in turn cites *Bush v. Lucas*, 462 U.S. 367 (1983) and *United States v. Fausto*, 484 U.S. 439 (1988).

the clear statement test (or rule) developed in *Kent v. Dulles* 357 U.S. 116 (1958).[9] The test requires a clear statement from Congress of its intent before the Court can construe legislation. In other areas of law the Court uses the clear statement rule as a model to ensure that an individual's constitutional rights are not deprived of adequate protection except by deliberate congressional design and to determine whether congressional legislation precludes judicial review of agency actions.[10]

In the instant case, the clear statement rule would require this Court to find that Congress has explicitly provided that the CSRA should preempt the FTCA before the Court could rule to that effect. But nowhere in the CSRA did Congress state or imply that the provisions of the CSRA should preclude federal employees from filing common law tort claims against the United States for the unlawful acts committed by federal officials during the course of their employment. And the Federal Tort Claims Act has been amended specifically to provide that the United States shall be substituted as the only proper defendant in cases alleging common law torts against federal employees committed

[9] See: **Peremption of Bivens Claims: How Clearly Must Congress Speak?** by Betsy J. Grey, *Washington University Law Quarterly*, Vol. 70:1087, at 1109-1110. (In *Kent v. Dulles*, 357 U.S. 116 (1958), the Supreme Court considered whether, under the federal immigration statutes, the Secretary of State could deny passports to two citizens who refused to disclose whether they had ever been Communists. The Court refused to construe legislation as delegating this power to the Secretary of State. Because passport denial would have curtailed a constitutionally protected ability -- the right to travel freely -- the Court interpreted the legislation narrowly. In so holding, the Court announced a test that has become known as the clear statement rule: "[W]e deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress [by federal legislation] had given the Secretary authority to withhold passports from citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." 357 U.S. at 130.

[10] Ibid.

during the course of their duties. See 28 U.S.C. 2679(d)(2). The 1988 amendment to the FTCA provided that:

> "The United States, through the Federal Tort Claims Act ... is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment. ... It is the propose of this Act ... to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States. See: 28 U.S.C. 2671, Editorial Notes, 1988 Amendment.

Given the clear language of the FTCA and the lack of a clear provision that the CSRA should preempt it, this case should not be dismissed for lack of jurisdiction.

II.

If certiorari is not granted and the Supreme Court upholds the Ninth Circuit's ruling to deny jurisdiction of this case, in effect, the CSRA will have been overturned and the executive branch will be above the law.

The CSRA, through its regulations, prescribes an elaborate remedial scheme to adjudicate the grievances of federal employees and provide a mechanism for reporting official wrongdoing and punishing the guilty. The flow chart on page A-9, infra, depicts this remedial scheme.

Since filing Del's first grievance in April, 1989, the Kidd's have proceeded through the entire remedial process. They filed three grievances pursuant to the Department of Interior's grievance regulations. (See boxes 1 through 7 on the flow chart.)

They reported Del's transfer to the OSC claiming it constituted a prohibited personnel practice because, among other things, it was issued in reprisal for his exercising his appeal rights. (See boxes 9 and 11 on the chart.) They also complained to the OSC that the officials had willfully violated established grievance and personnel regulations and had effectively deprived Del of the process due him under law by deliberately mishandling his grievances. (See boxes 8 and 11 on the chart.) And later, they reported Del's 14-day suspension to the OSC, claiming it constituted a prohibited personnel practice because it was issues in reprisal for whistleblowing and reprisal for exercising his appeal rights. Because he claimed reprisal for whistleblowing, Kidd's 14-day suspension was appealable to the Merit System Protection Board (MSPB) under the Whistleblower Protection Act (WPA). (See boxes 10, 11, 13, 14, 17 on the flow chart.) After proceeding through all legal appeals, the official wrongdoing was not addressed and has not been adjudicated.[11]

This case was not filed because the Kidds were "unsatisfied with the results" of the grievances, as the Ninth Circuit assumed. See: page A-2, infra. It was filed because the remedial scheme failed to redress the official wrongdoing and, as the flow chart illustrates, the system provides no avenue for judicial review.

This tort action arose because officials involved in the processing of Kidd's three grievances willfully conspired to

[11] These events have caused the Kidds to file three related federal law suits:

1) this tort action, filed first as the statute of limitations was about to expire;

2) an appeal to the Federal Circuit and the Supreme Court of the Merit System Protection Board's determination that Kidd's claims could not be heard by the Board because he was found not to be a whistleblower; Supreme Court Case No. 93-949, Petition for Certiorari, filed December 13, 1993; and

3) a suit filed seeking judicial review of all aspects of the case not heard by the MSPB: Case No. CV-S-92-583, filed in the Nevada District Court. That case was dismissed, in part, for lack of subject-matter jurisdiction and, in part, by summary judgement, and is now on appeal in the Ninth Circuit as Docket No. 93-17336.

violate established regulations. For example, to insure an impartial hearing of a grievance, the regulations provide that if the person designated to be the deciding official has been involved in or taken an action or made a decision in the matter being grieved, he/she must disqualify himself/herself from the process and forward the grievance to the next higher administrative level. 370 DM 771.3.11A.[12] In Kidd's case, as the complaint states, the decision to transfer Kidd was made and approved by the Assistant Regional Director and Regional Director of the Lower Colorado Region as well as the Chief of Personnel in Denver. That same Chief of Personnel subsequently refused to allow Kidd to amend his first grievance, created Kidd's second grievance, and then designated the same Assistant Regional Director to hear the grievance informally and the same Regional Director to be the deciding official. All three had been involved in deciding Kidd's transfer and not one disqualified himself from the process as the regulations require.

To insure the prompt handling of grievances, the regulations also provide that when the Office of Hearings and Appeals is asked to review a grievance, the examiner shall schedule the proceedings so that inquiry will begin within 21 days after the date the grievance is assigned. 370 DM Subchapter 3, Appendix A-1C. But, in Kidd's case, the chief examiner deliberately delated the hearing for a full nine months. After the hearing, regulations require that the examiner must submit his report of findings and recommendations to the deciding official within 30 days after the conclusion of the inquiry. 370 DM 771.3.20E. In Kidd's case, the examiner's report was delayed for two years.

The Ninth Circuit mistakenly assumed that "even if Del's grievances were somehow mishandled, the CSRA provides a remedy -- administrative review by the Merit System Protection Board and a subsequent appeal to the Federal Circuit." See: page A-4, infra. The MSPB's jurisdiction is limited to specific subjects

[12] Department of Interior Departmental Manual, cited herein as 370 DM.

referred to as "appealable actions."[13] They are: (1) adverse actions,[14] (2) performance related actions, (3) within grade increase denials, (4) reduction in force actions, and (5) retirement-related actions. 5 U.S.C. 1202.3. None of the actions taken against Kidd were "appealable actions" and none could have been appealed by Kidd to the MSPB.

The Whistleblower Protection Act of 1989, however, amended the CSRA. It provides an employee's only individual right of action to the MSPB and federal court of otherwise unappealable issued, but only if the employee can prove he/she was a whistleblower. The WPA came into effect just days after Kidd was transferred in July, 1989. A year later, when Kidd was suspended for 14 days, his allegations of reprisal for whistleblowing made the suspension appealable to the MSPB under the WPA. Kidd's lawyer attempted to present the related prohibited personnel practices and official wrongdoing, but the MSPB judge refused to hear them because they occurred prior to the effective date of the WPA. As a result, the bulk of Kidd's complaints were not appealable to the MSPB or any court, and the official wrongdoing has never been and will not be adjudicated.

The WPA also provides that the OSC shall receive disclosures of violations of any law, rule, or regulation, 5 U.S.C. 1212(a)(3), as well as allegations of prohibited personnel practices, 5 U.S.C. 1212(a)(2). It also requires the OSC to investigate allegations of prohibited personnel practices to the extent necessary to determine their merit, 5 U.S.C. 1214(a)(1)(A), and if it chooses, to take action against the offenders before the MSPB.

Twice the Kidds reported prohibited personnel practices and the official's wrongdoing to the OSC. But as the complaint in the instant case sets forth, the OSC failed to sufficiently

[13] The "appealable actions" jurisdiction of the MSPB is recited at length at 5 C.F.R. 1202.3

[14] 5 U.S.C. defines adverse actions as a removal, suspension for more than 14 days, reduction in grade, reduction in pay or a furlough for 30 days or less.

investigate Kidd's allegations.[15]

In dismissing the common-law tort claims presented by this case the Ninth Circuit cited *Rivera*, where it held that the CSRA provides the exclusive remedy for federal civil servants who allege claims arising out of their employment. See p. A-, infra. But Mary Rivera, also a federal employee, did not seek redress through the administrative scheme established by the CSRA. See 942 F.2d at 949-950. And her claims did not arise out of violations of that scheme.

For the court to accept as fact that federal officials in the instant case willfully violated the very regulations that establish and administer the 'exclusive' remedial scheme and then hold that the violated scheme is Kidd's only available remedy is ludicrous on its face. If federal officials can violate the CSRA at will then all of the protection and provisions Congress so painstakingly placed in that Act's regulations become meaningless and federal employees who use the scheme are left totally unprotected.

In arguing that Kidd's common-law tort claims should be dismissed the government also cited *Saul*. But Saul, a federal employee like Rivera, did not use the CSRA's remedial scheme but filed directly in court. The Ninth Circuit found that because Saul could have sought redress by either filing a grievance or initiating an investigation by the OSC, his tort action had to be denied. The Ninth Circuit held that:

> "In so far as the CSRA offered Saul remedies, his state tort claims must be preempted to prevent them from conflicting with the remedial system Congress prescribed for federal employees. Even

[15] It was learned in the Kidd's related judicial review suit that the OSC's investigation into Kidd's allegation consisted of one phone call to an employee in the personnel department that had handled Kidd's grievances. Based on that one conversation, the OSC determined that all of Kidd's claims lacked merit and that his constitutional rights had not been violated. It then closed its investigations ending the appeals process. In discovery for the related case, the OSC refused to divulge the basis of its determination and all information developed in its investigations has been deemed privileged.

where the CSRA provided Saul no remedy, peremption of his work-related tort claims is necessary to fulfill congressional intent." 928 F.2d at 843.

Kidd is not a federal employee for which the CSRA offered no remedy. Quite the contrary, the CSRA's remedial scheme was intended to handle just such a case. And had the officials administering the scheme acted within the law and had the OSC done its job, Kidd would have no tort claims. But officials did violate the regulations and the process failed to redress that wrong leaving Kidd unprotected. It was most assuredly not the intent of Congress to allow such violations to go unredressed. But if the Ninth Circuit's ruling stands, the courts will have upheld lawlessness, negating Congress's intent in passing the CSRA to provide an honest government, and the executive branch of our government will be above the law.

III.

Certiorari should be granted to overturn the Ninth Circuit's dismissal of the *Bivens* claims in this case. Under precedent and law, the individuals officials should be held liable.

If the 'clear statement' test, argued above, is applied to the issue of whether individual federal officials are liable for their unconstitutional acts during the course of their duties, the Federal Tort Claims Act provides the explicit intent of Congress. Paragraph one of 28 U.S.C. § 2679 grants federal employees immunity from common-law tort claims and makes the United States the only proper defendant for such claims. Paragraph two, however, clearly states that the immunity provided individual employees in paragraph one dies not apply to "a civil action against an employee of the Government which is brought ... for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2). Under this law, the individuals named in the instant case are liable for Kidd's constitutional tort claims.

In dismissing the constitutional tort claims against the

seventeen federal officials named in this case, the Ninth Circuit cited *Saul*. *Saul* in turn cites *Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988), which is the latest in a line of Supreme Court opinions that have shaped constitutional tort law.

In 1971, the Supreme Court established that a cause of action for damages could be inferred directly from the Constitution. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court determined that a constitutional cause of action against federal officials is proper when necessary to vindicate constitutional guarantees.

Following *Bivens*, the Court applied a two-prong test to determine whether an implied cause of action is necessary. According to the test, a Bivens action is permissible unless either (1) special factors counsel hesitation or (2) Congress has provided an alternative remedy intended to be an equally effective substitute for the *Bivens* claim.[16]

Over the years, the Court has significantly altered the nature and operation of the two-prong test. Initially, the critical inquiry in most cases was whether the claimant had an alternative remedy that was equally effective as a *Bivens* damage suit. See: *Carlson v. Green* 446 U.S. 14 (1980) and *Davis v. Passman*, 442 U.S. 228 (1979). Under the equally effective approach, *Bivens* actions were usually permitted.

More recently, however, the Court has shifted its emphasis to the special factors prong of the test. See *Bush v. Lucas* 103 S.Ct. 2404 (1983) and *Chappel v. Wallace*, 103 S.Ct. 2362 (1983). The Court has expanded the special factors prong to include statutory remedies that fail to satisfy the requirements

[16] In *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), the Court provided the clearest articulation of this two-prong test. The Carlson Court noted that a Bivens action may be defeated in two situations. "The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress,'" Id. at 18 (quoting *Davis v. Passman*, 442 U.S. 228, 245 (1979). "The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Id,. at 18-19.

of the alternative remedy prong. Instead of examining the relative effectiveness of the statutory redress, the Court has focussed on the mere availability of a statutory alternative. And in its most recent ruling in *Schweiker v. Chilicky*, 487 U.S. 412, (1988), involving the remedial scheme provided under the Social Security Disability Act, the Court made no pretense of searching for congressional intent, and instead deferred to the congressional remedial scheme merely because Congress had already created a remedy to deal with the wrongful acts in an area in which Congress arguably enjoyed special expertise that the Court lacked. The *Chilicky* Court held that "Courts must give appropriate deference to indications that congressional inaction has not been inadvertent and should not create Bivens remedies where the design of government programs suggests that Congress has provided what Congress considers to be adequate remedies for Constitutional violations that may occur in the course of [the] program's administration." See 208 S.Ct. at 2461. In *Chilicky*, the Court has developed a new "inadvertency" test for determining congressional intent. Presumably, the Court now permits a *Bivens* action only if the claimant faces a damages or nothing situation.

So, how do these precedents apply here? If the CSRA's regulations that establish and administer the remedial scheme can be willfully violated and the remedy they provide can effectively be denied, what difference does it make what Congress intended? A violated scheme cannot be deemed adequate, effective or available. And the mere existence of the scheme cannot counsel hesitation when the scheme was not lawfully administered. Furthermore, unlike the Social Security remedial scheme at issue in *Chilicky*, the *Bush* Court found no indication that Congress intended the remedial provisions of the civil service rules to be a 'substitute' for a *Bivens* action.[17]

Kidd's only recourse was to report the official wrongdoing to the OSC. But the right to petition the OSC is a constitutionally inadequate remedy because its protections are wholly

[17] Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action: *Harvard Law Review*, Vol. 101: 1232.

discretionary.[18] The statute directs the Special Counsel to "receive any allegation of a prohibited personnel practice and . . . investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. 1206(a)(l). If the Special Counsel concludes that such reasonable grounds exist, he/she is directed to report that conclusion to the MSPB, the agency involved, and the Office of Personnel Management. Id. § 1206(c)(1)(A). Any further action is wholly discretionary: the Special Counsel need not submit recommendations concerning corrective action to the MSPB and the MSPB need not order corrective action. See id. § 1206(c)(1)(A)-(B). Thus, an employee who alleges constitutional violations surrenders control of his claim to an office that has vast discretion not to prosecute his action. By law, all he can do is force the OSC to investigate and consider his case; he cannot even challenge the OSC's disposition of his claim or seek judicial review to determine whether it was arbitrary, capricious, or unsupported by substantial evidence.[19] Because this procedure does not guarantee relief for unconstitutional actions, even those taken in validation of "clearly established" constitutional law, the CSRA remedy is constitutionally inadequate.

In Kidd's case, the OSC closed its investigations after making only one phone call to the personnel division responsible for handling Kidd's grievances. Kidd's only recourse now is damages or nothing.

[18] The following passages are taken directly from: **Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action:** *Harvard Law Review*, Vol. 101: 1232.

[19] Judicial review of the Office of Special Counsel's decision whether to pursue a case is "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry on which to base its disposition of an employee's petition." *Cutts v. Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982). Although Cutts concerned OSC inquiries into charges of violation of statutes and not of the Constitution, subsequent courts have assumed that the limitations on judicial review hold in constitutional cases as well. See, e.g., *Spagnola*, 809 F.2d at 23-24, 27-28.

The claimants in applicable preceding cases either failed to pursue their administrative remedy under the CSRA, as in *Saul* and *Rivera*, or they filed a *Bivens* action after they had already been otherwise compensated. The space engineer in *Bush* filed after he had successfully perused his administrative remedies and had been reinstated and received back pay. See 462 U.S. 367. And the social security recipient claimants in *Chilicky* filed a *Bivens* action after their benefits, that had been improperly terminated, were restated 108 S.Ct. 2426 at 2460) and after Congress had passed legislation to specifically corrected the problem. Id. at 2461.

Kidd is distinguished from preceding claimants. For, not only has he not been compensated, but the discipline actions taken against him remain on his employment record and his job remains at risk. Kidd is still employed with the Bureau of Reclamation under the same type of management. If the officials named in this case are not held accountable for their unlawful actions, there is nothing to prevent them from repeating the scenario and eventually forcing Kidd from federal service.

CONCLUSION

When the elaborate remedial scheme established by Congress in the CSRA and its regulations is willfully violated by government officials in the course of their employment depriving another federal employee of the process due him, the United States must be held accountable under the FTCA and the individuals must be liable under the same act for their unconstitutional actions. The system provides no other avenue for any judicial review. There is no other remedy for the claims presented here. *Marbury v. Madison* reminds us that the Constitution is paramount law. And as Chief Justice Marshall argued, "[I]f the laws furnish no remedy for the violation of a vested legal right, a government of laws, and not of men, ceases to exist. 5 U.S. (1 Cranch) 137, 163 (1803.